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Is the Price of Victory Just: Attorney's Fees, Punitive Damages, and the Future of Title IX in Mercer v. Duke University

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IS THE PRICE OF VICTORY JUST?: ATTORNEY'S FEES, PUNITIVE DAMAGES, AND THE FUTURE OF TITLE IX IN *MERCER V. DUKE UNIVERSITY*

I. INTRODUCTION

Title IX of the Education Amendments of 1972 ("Title IX") has been one of the most controversial topics in America since its inception.[1] Both lauded and despised, Title IX's enactment introduced major ramifications for athletic programs falling within its jurisdiction, including colleges and universities receiving funds from the federal government.[2] Throughout the United States, many colleges and universities faced the need to make institutional changes in their athletic programs after realizing they were not in compliance with the statute's regulations.[3] Litigation under Title IX forced the judiciary to clarify the contours of Title IX's ambiguous provisions, a process that continues to this day.[4]

1. *See* Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681-88 (2000) (forbidding institutions that receive federal funds from discriminating in interscholastic, intercollegiate, club, or intramural athletic programs). Title IX may now be cited as the "Patsy Takemoto Mink Equal Opportunity in Education Act." *See* Act of Oct. 29, 2002, Pub. L. No. 107-255, 116 Stat. 1734, 1734 (renaming Title IX: Patsy Takemoto Mink Equal Opportunity in Education Act).

2. *See* 20 U.S.C. § 1681(a) (applying Title IX regulations to all educational programs receiving federal financial assistance). Section 1681 is the substantive section of Title IX, and provides that: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." *Id.* Presently, Title IX applies to the admissions policies of educational institutions, including vocational schools, professional schools, and graduate schools, and applies to any other educational "program" or "activity" that receives federal funds. *See id.*; *see also* WALTER T. CHAMPION, JR., FUNDAMENTALS OF SPORTS LAW § 13:4, 391 (2d ed. 2004) (addressing differences in interpretation of "program or activity" language of Title IX regulation). For a further discussion of the scope of Title IX's application to colleges and universities, see *infra* notes 53-61 and accompanying text.

3. *See* Renee Forseth et al., Comment, *Progress in Gender Equity?: An Overview of the History and Future of Title IX of the Education Amendments Act of 1972*, 2 VILL. SPORTS & ENT. L.J. 51, 51-52 (1995) (discussing programmatic changes colleges and universities made as result of "explosion in Title IX litigation . . .").

4. *See* Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 13, 19-20 (2000-01) (highlighting debate over Title IX's efficacy in institutional athletics); *see also* Diane Heckman, *The Glass Sneaker: Thirty Years of Victories and Defeats Involving Title IX and Sex Discrimination in Athletics*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 551, 561-86 (2003) (survey-

Mercer v. Duke University (*Mercer III*),[5] highlights the complexities of Title IX in athletics jurisprudence. In *Mercer III*, Heather Mercer ("Mercer"), a former kicker for Duke University's football team, sued Duke and the football team's coach under Title IX for discriminating against her on the basis of sex.[6] As the first woman ever to be a member of a Division I-A football team, Mercer's suit carried tremendous symbolic, as well as practical, significance.[7]

In fact, *Mercer III* implicated not only Title IX, but also many broader issues, including the role of women in contact sports, the damages available to a Title IX plaintiff, and institutional responsibility for sexually discriminatory conduct of an athletic coach.[8] After seven years of litigation, however, *Mercer's* history looks more like a rollercoaster ride than a straight run to victory.[9] Further, as a result of the numerous appeals and remands, *Mercer's* full import has neither been fully addressed nor understood.[10]

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ing thirty-year history of Title IX in athletics vis-à-vis significant case law and concluding that barriers to women in athletics are still pervasive). "[A]ntagonism with Title IX is not a new phenomenon. Since the Tower Amendment in 1974, individuals have sought to pierce Title IX overall, or at least fillet the law when it comes to interfering with men's sports." Heckman, *supra*, at 582 (citation omitted).

5. 401 F.3d 199, 212 (4th Cir. 2005) (holding plaintiff could recover attorney's fees under Title IX lawsuit against university, despite recovering nominal damages only in underlying suit). The United States Court of Appeals for the Fourth Circuit referred to its prior holdings in *Mercer v. Duke University* (*Mercer I*), 190 F.3d 643 (4th Cir. 1999), and *Mercer v. Duke University (Mercer II)*, 50 F. App'x 643 (4th Cir. 2002). *See id.* at 202. This Note utilizes the Fourth Circuit's nomenclature.

6. *See* Mercer v. Duke Univ. (Mercer—Dist. Ct. II), 181 F. Supp. 2d 525, 531 (M.D.N.C. 2001) (providing facts of case), *vacated in part and remanded per curiam*, 50 F. App'x 643 (4th Cir. 2002). For a further discussion of the facts and procedural history of *Mercer III*, see *infra* notes 19-50 and accompanying text.

7. *See Mercer III*, 401 F.3d at 201 (providing factual background of case); Mercer v. Duke Univ. (Mercer—Dist. Ct. III), 301 F. Supp. 2d 454, 465 (M.D.N.C. 2004) ("Mercer's lawsuit did indeed vindicate her rights with regard to a significant legal issue while at the same time it also advanced an important public goal.").

8. *See Mercer—Dist. Ct. III*, 301 F. Supp. 2d at 466 ("[The *Mercer* case] will also reiterate to educational institutions the importance of investigating students' claims of discrimination and the importance of informing their faculties that sexual discrimination under Title IX is a serious violation of public policy."); *see also* Abigail Crouse, Comment, *Equal Athletic Opportunity: An Analysis of* Mercer v. Duke University *and a Proposal to Amend the Contact Sport Exception to Title IX*, 84 MINN. L. REV. 1655, 1670-73 (2000) (detailing Fourth Circuit's decision in *Mercer I*, which established new limitation to contact sport exception defense); Charles L. Rombeau, Note, Barnes v. Gorman *and* Mercer v. Duke University*: The Availability of Punitive Damages in Title IX Litigation*, 6 U. PA. J. CONST. L. 1192, 1202-06 (2004) (discussing ramifications of *Mercer II* holding related to denying punitive damages as remedy for Title IX violations).

9. For a detailed discussion of *Mercer III*'s facts and procedural history, see *infra* notes 19-50 and accompanying text.

10. For a further discussion of the possible significance of *Mercer III*, see *infra* notes 166-73 and accompanying text.

With the Fourth Circuit's recent opinion in *Mercer III*, which upheld Mercer's entitlement to attorney's fees, it appears that Mercer's saga has come to a close.[11] The Fourth Circuit upheld Mercer's award of attorney's fees, even though she recovered only one dollar in the underlying suit.[12] Not only does this holding impact the already contentious climate of Title IX in athletics, it also raises the questions of when, and under what circumstances, the recovery of attorney's fees is appropriate in Title IX lawsuits, especially when it is unclear whether the claiming party has prevailed in the suit.[13]

This Note discusses the ramifications of the Fourth Circuit's decision in *Mercer III*. It focuses on Title IX plaintiffs' ability to recover attorney's fees when punitive damage awards are prohibited.[14] Section II details the facts and procedural history of *Mercer III*.[15] Section III provides the legal principles relevant to the case: Title IX of the Education Amendments of 1972, the Civil Rights Attorney's Fees Awards Act of 1976, and the United States Supreme Court's test articulated in *Farrar v. Hobby*.[16] Section IV describes the *Mercer III* Court's reasoning, and Section V analyzes the Court's opinion based on the prevailing legal standard and other circuit courts' decisions.[17] Finally, Section VI examines *Mercer III*'s impact, including its implications on Title IX sex discrimination jurisprudence, and the likely consequences on Title IX plaintiffs' ability to recover attorney's fees.[18]

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11. *See Mercer III*, 401 F.3d at 208-09 (affirming district court's award of attorney's fees and nominal damages to plaintiff). For a further discussion of the court's holding and an examination of its reasoning in *Mercer III*, see *infra* notes 136-73 and accompanying text.

12. *See Mercer III*, 401 F.3d at 202 (stating holding of case).

13. *See generally* Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988(b) (2000) (indicating that reasonable attorney's fees may be awarded to prevailing party at district court's discretion). For a further discussion of § 1988, see *infra* notes 35-49 and accompanying text. For a further discussion of Title IX's application to athletic programs of educational institutions, see *infra* notes 51-61 and accompanying text.

14. For a further discussion of the potential impact of *Mercer III* on whether a nominally-recovering plaintiff will recover attorney's fees, see *infra* notes 174-78.

15. For a further discussion of the facts and procedural history of the case, see *infra* notes 19-50 and accompanying text.

16. 506 U.S. 103 (1992). For a detailed discussion of *Farrar*, see *infra* notes 78-103 and accompanying text.

17. For a useful review and critique of the Fourth Circuit's opinion in *Mercer III*, see *infra* notes 174-99 and accompanying text.

18. For a discussion of the potential effect of this decision, see *infra* notes 203-11 and accompanying text.

II. FACTS

In *Mercer III*, the Fourth Circuit examined the propriety of an attorney's fees award to the plaintiff under § 1988, despite the plaintiff recovering only nominal damages in the underlying suit.[19] The plaintiff, Heather Mercer, a former kicker on Duke University's Division I-A football team, brought the original action under Title IX.[20] Mercer, who entered Duke University in 1994 as a full-time student, was an all-state place kicker on her high school football team and wanted to continue playing football at the collegiate level.[21] When Mercer contacted Duke's head football coach, Fred Goldsmith ("Goldsmith"), about her interest in joining the team as a walk-on, Goldsmith asked her to try out.[22] According to the evidence presented at trial, this was the first time Goldsmith ever required a walk-on player to try out.[23] Following Mercer's try-out, Goldsmith informed her that she did not make the team, but allowed her to become the team manager.[24]

In April 1995, after the senior teammates chose Mercer as their first pick kicker for an intra-squad scrimmage, Mercer kicked the winning field-goal; Goldsmith then made Mercer a playing member of the team.[25] After Mercer officially became part of the team, an onslaught of media attention and publicity ensued; some of which cast Mercer's membership in a negative light.[26] Goldsmith ap-

19. *See Mercer III*, 401 F.3d at 200 (outlining issue on appeal). For a useful examination and critique of the Fourth Circuit's holding in *Mercer III*, see *infra* notes 174-202 and accompanying text.

20. *See Mercer III*, 401 F.3d at 201 (outlining procedural history).

21. *See id.* at 200-01; *see also* Mercer v. Duke Univ. (Mercer—Dist. Ct. II), 181 F. Supp. 2d 525, 529-30 (M.D.N.C. 2001) (mem. op.) (providing detailed factual background of case), *vacated in part and remanded per curiam*, Mercer II, 50 F. App'x 643 (4th Cir. 2002). In fact, *The New York Times* featured Mercer for her kicking abilities and interest in participating in football, a traditionally all-male sport. *See* Kate Stone Lombardi, *Somewhere over the Goal Post a Girl's Dream Lies*, N.Y. TIMES, Sept. 26, 1993, § 13, at 1.

22. *See Mercer—Dist. Ct. II*, 181 F. Supp. 2d at 530 (summarizing background facts of case).

23. *See id.* (stating facts of plaintiff's Title IX action against Duke University).

24. *See id.* (supplying background information regarding Mercer's participation in football team). During the 1994-95 football season, Mercer served as one of the team's managers, attended all practices and games, and participated in the winter and spring conditioning programs. *See id.*

25. *See id.* at 530-31 (summarizing facts and testimony adduced at trial). During trial, two past members of the team testified on Mercer's behalf, confirming that they chose Mercer to play on their team because she was the superior player among the kickers. *See id.* at 531 n.2.

26. *See id.* at 531 (summarizing events surrounding Mercer's official promotion to be team's kicker). According to the facts, Goldsmith was upset by an article in a Georgia newspaper that mocked Duke for having a female football player on its team. *See id.*

peared to begin to regret making Mercer a member, fearing the attention would negatively impact the rest of the team.[27] Subsequently, beginning in the summer of 1995, when Goldsmith barred Mercer from pre-season camp, Goldsmith's behavior became increasingly discriminatory.[28] For example, Goldsmith prohibited Mercer from standing with her team during home games, explaining that "her presence would create an undesirable 'Heather Sue Media Watch.'"[29] Finally, in the fall of 1996, Goldsmith officially dismissed Mercer from the team.[30] This was the first time in Goldsmith's career as head coach that he dismissed a Duke football player for "performance reasons."[31]

Mercer filed suit against Duke University and Goldsmith, seeking declaratory, injunctive, and monetary relief, alleging they violated Title IX by discriminating against her on the basis of sex.[32] The United States District Court for the Middle District of North Carolina dismissed Mercer's complaint based on an interpretation of the statutory "contact-sport exception."[33] On appeal, the Fourth

27. *See Mercer—Dist. Ct. II*, 181 F. Supp. 2d at 531 (chronicling Goldsmith's treatment of Mercer following her promotion to team kicker).

28. *See id.* at 531-32 (detailing Goldsmith's discriminatory conduct). Goldsmith's discriminatory actions in the ensuing year included refusing to allow Mercer to dress for games, prohibiting her from sitting on the sidelines with the team, and making numerous pejorative comments to Mercer. *See id.* at 532. For example, he told Mercer she should "outgrow her interest" in playing football, should consider "other extracurricular activities, such as beauty pageants" or the cheerleading squad, advised her to "sit in the stands 'with her boyfriend,'" and made general remarks about her physical appearance. *Id.*

29. *Id.* (outlining Goldsmith's sexually discriminatory actions).

30. *See id.* at 534 (recounting events surrounding Mercer's termination from team).

31. *See id.* (paraphrasing testimony of Goldsmith at trial). During the trial, Goldsmith asserted that he dismissed Mercer from the team because of her "poor performance," alleging, among other things, that she could not kick long distances and that "she was unable to make any meaningful contribution to the team . . . ." *Id.* at 534. The *Mercer—Dist. Ct. II* Court found that Goldsmith's testimony contradicted the overwhelming evidence regarding Mercer's abilities. *See id.* at 538. Two football coaches, both of whom coached Mercer during summer camps, testified that Goldsmith's statements about Mercer's kicking abilities completely contradicted their own observations of her. *See id.* at 534.

32. *See* Mercer v. Duke Univ. (Mercer—Dist. Ct. I), 32 F. Supp. 2d 836, 837-38 (M.D.N.C. 1998) (setting forth plaintiff's claims).

33. *See id.* at 839 (holding Mercer's claim failed as matter of law because "straightforward reading" of regulation allowed Duke to restrict women from football team under exception). Under Title IX's interpretive regulations, when a school has a single-sex team, with no comparable team for members of the opposite sex, the school must allow members of the opposite sex to try out for that team, "*unless the sport involved is a contact sport.*" 34 C.F.R. § 106.41(b) (1988) (emphasis added). This provision is known as the "contact sport exception." *See Mercer—Dist. Ct. I*, 32 F. Supp. 2d at 839 (noting that "'the contact sport exception' is the broadest exception recognized to the overarching goal of equal athletic oppor-

Circuit reversed the decision, holding that the contact-sport exception was inapplicable in the circumstances, and remanded the issue to the district court for further proceedings.[34]

On remand to the district court, a federal jury found that Goldsmith had discriminated against Mercer in violation of Title IX, awarding Mercer two million dollars in punitive damages, one dollar in compensatory damages, and approximately $389,000 in attorney's fees and costs.[35] On appeal, however, the Fourth Circuit in *Mercer II* vacated the punitive damages award, relying on a recent

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tunity" (quoting Williams v. Sch. Dist. Of Bethlehem, 998 F.2d 168, 172 (3d Cir. 1993))). Section 106.41(b) lists the following sports as "contact sports": "boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact." 34 C.F.R. § 106.41(b); *see also* Mercer I, 190 F.3d 643, 646-47 (4th Cir. 1999) (examining Title IX's implementing regulations applying to athletics). While § 106.41 requires schools to grant women membership on all-male teams when there is no equivalent female team, this requirement normally does not extend to schools' "contact sports." *See Mercer I*, 190 F.3d at 646-47 (explaining meaning of 34 C.F.R. § 106.41 (a) and (b) for contact sport exception). Therefore, Mercer's case was unique in that her membership on an all-male football team, clearly a contact sport, effectively challenged the scope of the contact-sport exception. *See id.* at 647-48.

34. *See Mercer I*, 190 F.3d at 648 (stating holding). In reversing and remanding the case to the district court, the *Mercer I* Court addressed the meaning of the contact sport exception. *See id.* at 646-47 (interpreting 34 C.F.R. § 106.41(b)). The *Mercer I* Court found that courts could interpret the contact-sport provision in one of two ways: (1) that the exception places any contact sport outside the purview of Title IX regulations completely; or (2) that the exception merely exempts contact sports teams from the requirement that they allow members of the opposite sex *to try out for* that team. *See id.* at 647 (emphasis added). The *Mercer I* Court upheld the latter interpretation, explaining that exempting contact sports completely from the ambit of Title IX would abrogate the statute's fundamental purpose. *See id.* at 647-48. The court reasoned that when a school allows a woman to join a contact sport team, the school effectually waives its right to the contact-sport exception. *See id.* at 648. Accordingly, the court concluded that Mercer's suit should not be dismissed under the contact-sport exception because the head coach had allowed Mercer to try out and become a member of the team, thus subjecting Duke to Title IX standards. *See id.* This holding significantly diverged from traditional interpretations of the contact-sport exception. *See id.* ("[I]n so holding, we thereby become the first Court in United States history to recognize such a cause of action.").

35. *See* Mercer—Dist. Ct. II, 181 F. Supp. 2d 525, 552-54 (M.D.N.C. 2001) (summarizing jury's verdict and deciding post-trial motions submitted by both parties), *vacated in part and remanded per curiam*, Mercer II, 50 F. App'x 643 (4th Cir. 2002). Following the jury's verdict, Duke submitted a post-trial motion for judgment as a matter of law, or in the alternative, for a new trial, while Mercer submitted a request for attorney's fees. *See id.* at 554. Here, the district court dismissed Duke's motion, concluding that punitive damages were an available remedy under Title IX, that the evidence supported the jury's conclusions, and that the punitive damages award was not excessive. *See id.* at 548, 551-52. Accordingly, the district court held that Mercer was the prevailing party of the suit, and thus, was entitled to reasonable attorney's fees. *See id.* at 553 & n.13.

Supreme Court decision, *Barnes v. Gorman*.[36] In *Barnes*, the Supreme Court held that private litigants of suits under section 202 of the Americans with Disabilities Act ("ADA") cannot recover punitive damages.[37] The *Barnes* Court based its decision on Title VI of the Civil Rights Act of 1964, where the remedies mirror those of the ADA and the Act precludes litigants of private actions from recovering punitive damages.[38] Consequently, the *Mercer II* Court concluded that because Title IX "is interpreted and applied in the same manner as Title VI," private litigants under Title IX may not recover punitive damages.[39]

Despite vacating Mercer's award of punitive damages, leaving her with only one dollar in compensatory damages, the *Mercer II* Court rejected Duke's claim that Mercer was no longer entitled to attorney's fees as a matter of law.[40] Instead, the court remanded the issue to the district court to decide "in light of Mercer's now limited success at trial" whether she should recover attorney's fees and, if so, what amount.[41]

In remanding the case, the *Mercer II* Court suggested that the Supreme Court's holding in *Farrar v. Hobby* should guide the district court in deciding attorney's fees and costs.[42] In particular, the

36. *See* Mercer II, 50 F. App'x 643, 644 (4th Cir. 2002) (construing Barnes v. Gorman, 536 U.S. 181 (2002), which held that Title VI of Civil Rights Act of 1964 precludes private litigants from recovering punitive damages). In fact, the *Mercer II* Court delayed rendering its appellate decision for more than a year, waiting for the Supreme Court's decision in *Barnes*, which addressed punitive damages awards under the Americans with Disabilities Act. *See id.*

37. *See Barnes*, 536 U.S. at 189 (stating holding and applying Civil Rights Act of 1964, Title VI (Title VI), 42 U.S.C. §§ 2000d - 2000d-7 (2000)).

38. *See id.* (holding private litigants cannot recover punitive damage awards under ADA and Rehabilitation Act because punitive damages precluded under Title VI of 1964 Civil Rights Act). As the *Mercer II* court explained, "the Supreme Court's conclusion in *Barnes* that punitive damages are not available under Title VI compels the conclusion that punitive damages are not available for private actions brought to enforce Title IX." *Mercer II*, 50 F. App'x at 644.

39. *Mercer II*, 50 F. App'x at 644 (applying *Barnes* to Mercer's Title IX claim).

40. *See id.* at 645-46 (addressing Duke's challenge to validity of attorney's fees award based upon Farrar v. Hobby, 506 U.S. 103, 115 (1992)). Duke contended that Mercer's "nominal-damage award" prevented Mercer from prevailing as that term applies to § 1988 litigation, and thus, she should not recover any attorney's fees. *See id.*

41. *Id.* at 646 (applying Farrar v. Hobby, 506 U.S. 103, 115 (1992), to issue of case). The *Mercer II* Court acknowledged the general principle espoused in *Farrar* that, "[w]hen a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all." *Id.* (quoting *Farrar*, 506 U.S. at 115). Nevertheless, the court explained that it "never interpreted *Farrar* as automatically precluding attorney's fees in all nominal-damage cases." *Id.*

42. *See id.* (remanding case with instructions to district court). The *Mercer II* Court legitimized its remand of the issue of attorney's fees to the district court in

Mercer II Court referred to Justice O'Connor's concurring opinion, in which she articulated additional grounds for a court to award attorney's fees to a nominally-recovering plaintiff.[43]

On remand, the district court held that Mercer should still recover the attorney's fees from her Title IX claim.[44] Here, the district court followed the guidelines set forth in *Farrar*.[45] In particular, the district court utilized Justice O'Connor's three factor test from her concurring opinion in *Farrar*.[46] Applying these three factors, the court concluded that Mercer's victory was neither pyrrhic nor *de minimis*, and thus, she should recover reasonable attorney's fees.[47] The district court then calculated the amount that it deemed reasonable for recovery, resulting in a total award to Mercer of $349,243.96 for attorney's fees.[48]

Following the district court's decision, Duke appealed to the Fourth Circuit again in *Mercer III*, arguing that the district court erred in awarding attorney's fees and that the appropriate award "is

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stating: "Mercer's claim against Duke was the first of its kind, and the jury's conclusion that Duke violated Title IX may serve as guidance for other schools facing similar issues." *Id.* Thus, the *Mercer II* Court provided the district court with a contextual framework within which it could decide whether recovery of attorney's fees remained appropriate under the new circumstances. *See id.*

43. *See id.* (referencing *Farrar*, 506 U.S. at 121-22 (O'Connor, J., concurring)) (suggesting additional factors, including achievement of public goal, should guide lower court in assessing success of nominally recovering plaintiff). In *Farrar*, Justice O'Connor provided the requisite fifth vote for the majority opinion; however, she wrote a separate concurring opinion. *See Farrar*, 506 U.S. at 116. According to Justice O'Connor, "the success of a plaintiff who recovers only nominal damages 'might be considered material if it also accomplished some public goal other than occupying the time and energy of counsel, court, and client.'" *Mercer II*, 50 F. App'x at 646 (quoting *Farrar*, 506 U.S. at 121-22 (O'Connor, J., concurring)). For a further discussion of the O'Connor factors, see *infra* notes 104-35 and accompanying text.

44. *See* Mercer-Dist. Ct. III, 301 F. Supp. 2d 454, 466 (M.D.N.C. 2004) (mem.) (upholding award of attorney's fees to plaintiff Mercer).

45. *See id.* at 459 (noting Fourth Circuit's instructions to consider *Farrar*).

46. *See id.* (referencing *Farrar*, 506 U.S. at 121-22 (O'Connor, J., concurring)) (applying Justice O'Connor's three factors to analysis). For a further discussion of the three O'Connor factors, see *infra* notes 104-35 and accompanying text.

47. *See Mercer-Dist. Ct. III*, 301 F. Supp. 2d at 466 (concluding Mercer was entitled to reasonable attorneys fees).

48. *See id.* at 470 (calculating proper award amount for Mercer). The district court first reduced the total amount Mercer's attorneys sought, $430,000, by three percent, which was estimated to be the amount of time her attorneys devoted to her unsuccessful damages claim. *See* Mercer III, 401 F.3d 199, 202 (4th Cir. 2005) (summarizing district court's award calculations on remand). Then, the district court reduced that amount by twenty percent to reflect "Mercer's limited degree of success" in the case. *Id.* Finally, the court added in "fees on fees," which are the fees incurred in litigating the issue of attorney's fees. *See id.* at n.3. The total attorney's fee award was thus $349,243.96. *See id.*

an award of no fees at all."[49] The *Mercer III* Court affirmed the district court's holding, concluding that Mercer was entitled to attorney's fees as a prevailing party under § 1988, and upholding the amount of fees established by the district court.[50]

III. BACKGROUND: TITLE IX, THE ATTORNEY'S FEES AWARD ACT, AND CASE LAW ON RECOVERY OF ATTORNEY'S FEES IN CIVIL RIGHTS LITIGATION

While Title IX is most frequently associated with athletics, it permeates many areas of American life, from elementary education to employment practices.[51] In fact, the thirty-plus year history of Title IX reveals that its provisions have shaped us, stirred us, and ultimately, defined the dimensions of sexual equality in the United States.[52] Therefore, understanding some of the background legal principles, including the statutory bases of Mercer's claim, lends insight to the overall significance of Mercer's case.

A. Title IX of the Education Amendments

Title IX has been one of the most controversial statutory regulations in modern American history, particularly in the area of athletics.[53] Drawing its roots directly from Title VI of the Civil Rights

49. *Mercer III*, 401 F.3d at 203 (outlining parties' respective positions on appeal).

50. *See id.* at 208-09 (concluding district court did not abuse discretion in awarding plaintiff fees). For a complete analysis of the *Mercer III* Court's decision, see *infra* notes 136-202 and accompanying text.

51. *See, e.g.*, Jennifer Frost, *Sixth Annual Review of Gender and Sexuality Law: III. Education Law Chapter: Title IX of the 1972 Education Amendments*, 6 GEO. J. GENDER & L. 561, 565-68 (2005) (highlighting three types of Title IX claims: athletics, sexual harassment, and employment practices). With respect to employment, it should be noted that Title IX applies to only the employment practices of federally funded education institutions, while Title VII of the Civil Rights Act of 1964 governs all other workplace discrimination claims. *See* N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 540 (1982) (holding Title IX applies to sexually discriminatory employment practices by educational institutions that receive federal financial aid); *see also* Frost, *supra* at 567-68 (comparing scope of Title IX with Title VII regarding claims of discrimination in employment practices).

52. *See* National Organization for Women, *Save Title IX*, http://www.now.org/issues/title_ix/index.html (last accessed April 25, 2005) (listing women's advancements in various areas as result of Title IX); *see also* Heckman, *supra* note 4, at 563-611 (surveying women's status and progression in sports under Title IX).

53. *See* Brake, *supra* note 4, at 19-20 (highlighting controversial effects of Title IX). Following Title IX's passage, people greatly debated the scope of its application, particularly because the statute deferred to the enforcing agency, the Department of Health, Education, and Welfare ("HEW"), for the details of its administration and policy interpretation. *See* Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974) [hereinafter Javits Amendment] (modifying 1972 Education Amendment, authorizing HEW to promulgate regula-

Act of 1964 ("Title VI"),[54] Title IX was the legislative response to women's rights proponents seeking to end sex discrimination in education, just as Title VI aimed to combat racial discrimination.[55] Put simply, what Title VI did for race, Title IX did for gender.[56]

Title IX, under its substantive provisions, prohibits discrimination on the basis of sex or gender in all educational programs or

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tions for Title IX pursuant to Javits Amendment). After Congress passed the Javits Amendment, HEW promulgated regulations for the effectuation and enforcement of Title IX. *See* Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 40 Fed. Reg. 24,128, 24,128 (June 4, 1975) (establishing detailed rules regarding sex discrimination as implementation of Title IX). These regulations provided specific details for Title IX's application; the most controversial of which were those applying to athletic programs. *See* Office of Civil Rights, Department of Education (DOE) Nondiscrimination on the Basis of Sex Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. § 106 (2005) [hereinafter *Title IX Regulations*] (originally promulgated by HEW); *see also* Rombeau, *supra* note 8, at 1193 (noting dispute over Title IX focuses on collegiate athletics, despite fact that original statute makes no reference to athletics). In fact, only two regulations explicitly address athletics: 34 C.F.R. § 106.41 (2005) ("Athletics Regulation") and 34 C.F.R. § 106.37(c) (2005) (addressing athletic scholarships). *See* Mercer I, 190 F.3d 643, 645-46 (4th Cir. 1999) (outlining relevant provisions of Title IX as applied to athletics). The Athletics Regulation, 34 C.F.R. § 106.41(a)-(b), explicitly applies Title IX to athletic programs; thus, it is the source of controversy over Title IX's intended application in athletics. *See* Forseth et al., *supra* note 3, at 54-58 (providing detailed account of Title IX enactment).

54. *See* Title VI, Pub. L. No. 88-352 §§ 601-05, 78 Stat. 241, 252-53 (1964) (codified as amended at 42 U.S.C. §§ 2000d to 2000d-7 (2000)) (requiring nondiscrimination in all federally funded programs or activities, as means of furthering civil rights protections). In fact, Title VI and Title IX use almost identical language, except that "sex" in Title IX replaces the words "race, color, or national origin" in Title VI. *Compare id.* § 2000d (prohibiting discrimination on grounds of race, color, or national origin), *with* Title IX, 20 U.S.C. § 1681(a) (prohibiting discrimination based on sex); *see also* Cannon v. Univ. of Chi., 441 U.S. 677, 694-96 (1979) (highlighting similarities between Title VI and Title IX in holding that private right of action exists under both). For a more detailed legislative history of Title IX, see Christopher P. Reuscher, Comment, *Giving the Bat Back to Casey: Suggestions to Reform Title IX's Inequitable Application to Intercollegiate Athletics*, 35 AKRON L. REV. 117, 119-27 (2001).

55. *See* CHAMPION, *supra* note 2, § 13:4 (providing overview of Title IX's enactment and interpretation). The House of Representatives, in the Special Committee on Education, conducted hearings which specifically addressed gender discrimination in education. *See Discrimination Against Women: Hearings on H.R. 16098 § 805 Before the Special Subcomm. on Educ. of the H. Comm. on Educ. and Labor*, 91st Cong. 2d Sess. 2 (1970) [hereinafter *Discrimination Against Women Hearings*] (statement of Rep. Edith Green discussing need to redress women's disparate treatment in professional and educational areas, as compared with racial minorities); *see also* Note, *Cheering on Women and Girls in Sports: Using Title IX to Fight Gender Role Oppression*, 110 HARV. L. REV. 1627, 1634-35 (1997) (explaining feminist role and influences in passage of Title IX).

56. *See Discrimination Against Women Hearings*, *supra* note 55, at 2 (statement of Rep. Edith Green) (contrasting advancements in racial discrimination with gender discrimination).

activities receiving federal financial assistance.[57] While the United States Supreme Court held in *Grove City College v. Bell* that only those programs receiving direct federal funding were subject to Title IX,[58] Congress later overturned that interpretation when it passed the Civil Rights Restoration Act of 1987.[59] Consequently, Title IX now unequivocally applies to almost all secondary schools, colleges, and universities in the United States.[60] As long as an institution receives some type of federal financial assistance, it will be subject to Title IX's regulations.[61]

B. Attorney's Fees and the Civil Rights Attorney's Fees Award Act

The ruling on recovery of attorney's fees in the United States has a rich history.[62] The "American Rule," which the Supreme Court first officially recognized in the early 1800s, provides that parties bear their own costs and fees in litigation.[63] Subsequently, the Supreme Court modified the American Rule in *Newman v. Piggie*

57. *See* 20 U.S.C. § 1681(a) (2000) (prohibiting sex-based discrimination by recipients of federal financial assistance); *see also* Catherine Pieronek, *Title IX and Gender Equity in Science, Technology, Engineering and Mathematics Education: No Longer an Overlooked Application of the Law*, 31 J.C. & U.L. 291, 303 & n.80 (2005) (highlighting contrasting societal focus between Title IX's application in athletics and Title IX's application in academic contexts).

58. *See* Grove City College v. Bell, 687 F.2d 684, 705 (3d Cir. 1982) (interpreting provision applying Title IX to recipient of federal funds narrowly), *aff'd*, 465 U.S. 555 (1984).

59. *See* Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified as amended at 20 U.S.C. § 1687 (2000)) [hereinafter "Restoration Act"] (overturning *Grove City* legislatively and providing that recipient of federal funds will be subject to Title IX regulations, regardless of how funds are distributed). The provisions of the Restoration Act were incorporated directly into Title IX. *See* 20 U.S.C. § 1687 (2000).

60. *See* 20 U.S.C. § 1687 (defining "program or activity" which are subject to Title IX regulation). Section 1687 states in relevant part: "For the purposes of this chapter, the term 'program or activity' and 'program' mean all of the operations of . . . . a college, university, or other postsecondary institution, or a public system of higher education." *Id.*; *see also* Forseth et al., *supra* note 3, at 61-64 (outlining historical interpretations of Title IX provision regarding federal fund recipient).

61. *See* 20 U.S.C. § 1687 (detailing entities falling within scope of Title IX). For a general discussion of Supreme Court cases involving Title IX and sex discrimination in public education, *see* CHAMPION, *supra* note 2, § 13:4.

62. *See* Joseph Bean, *Felling the* Farrar *Forest: Determining Whether Federal Courts Will Award § 1988 Attorney's Fees to a Prevailing Civil Rights Plaintiff Who Only Recovers Nominal Damages*, 33 U. MEM. L. REV. 573, 574-83 (2003) (outlining history of attorney's fees in United States).

63. *See* Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717-18 (1967) (affirming American Rule for recovery of attorney's fees in United States).

Park Enterprises.[64] In *Piggie Park*, the Supreme Court allowed the plaintiff to recover attorney's fees under the "private attorney general" theory, which views successful civil rights plaintiffs as advancing a larger social good, rather than acting solely for their own benefit.[65] Nevertheless, in *Alyeska Pipeline Service Co. v. Wilderness Society*, the Supreme Court held that recovery of attorney's fees under federal statutes was only available with express statutory authorization.[66] Two months later, Congress effectively overturned *Alyeska* by enacting § 1988.[67]

Section 1988 is a federal law that allows a plaintiff suing under various federal statutes to recover attorney's fees when such plaintiff is a "prevailing party."[68] Title IX is among the federal statutes within § 1988's ambit.[69] Section 1988 provides: "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . ."[70]

Congress enacted § 1988 to provide prevailing civil rights plaintiffs with an equitable remedy, given that these litigants usually sought to vindicate larger moral rights, rather than monetary gain.[71] In adopting this provision, Congress recognized the important social issues that it could serve by enabling victims of discrimination in various contexts to have viable, legal recourse.[72] Despite

64. *See* 390 U.S. 400 (1968) (per curiam) (explaining rationale for allowing plaintiff to recover attorney's fees, despite American Rule).

65. *See id.* at 402 (stating holding of case).

66. *See* 421 U.S. 240, 250 (1975) (refusing to grant attorney's fees unless statute expressly provided for recovery of fees). For a further discussion of the history of attorney's fees in the United States, see Bean, *supra* note 62, at 574-83.

67. *See* 42 U.S.C. § 1988 (entitling prevailing civil rights plaintiffs to recover attorney's fees as well as litigation costs).

68. *See id.* § 1988(b) (detailing requirements for entitlement to recover attorney's fees).

69. *See id.* (listing statutory provisions applicable to § 1988 attorney's fees). Section 1988 currently applies to suits under the following federal statutory provisions: "sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, Title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000b(b) et seq.], Title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title . . . ." *Id.* (alterations in original).

70. *Id.* (setting forth right to recovery of attorney's fees).

71. *See* Farrar v. Hobby, 506 U.S. 103, 118-19 (1992) (O'Connor, J., concurring) ("Section 1988 was enacted for a specific purpose: to restore the former equitable practice of awarding attorney's fees to the prevailing party in certain civil rights cases . . . .").

72. *See* Hensley v. Eckerhart, 461 U.S. 424, 429 (1983) (recognizing that "[t]he purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances" (quoting H.R. Rep. No. 94-1558, p.1 (1976))); *see also* Bean, *supra* note 62, at 575-78 (discussing policy rationale of awarding attorney's fees).

the seemingly straightforward statutory language, federal courts frequently struggle with whether a prevailing party in a civil rights case should recover attorney's fees, especially where that party's "success" is debatable or significantly limited.[73]

According to the text of § 1988 and relevant case law, the lower courts retain wide discretion in deciding whether they will award attorney's fees.[74] This discretion, however, has resulted in the lack of a clear, uniform standard among the courts when deciding attorney's fees in the nominal-recovery context.[75] More significantly, while the United States Supreme Court addressed this issue in *Farrar*,[76] the Court's opinion left many unanswered questions that the lower courts must ultimately resolve.[77]

C. The Controlling Authority: *Farrar v. Hobby*

Farrar v. Hobby serves as the controlling authority on whether a plaintiff who recovers only nominal damages is a prevailing party under § 1988.[78] *Farrar* established that a party who recovers only nominal damages qualifies as a prevailing party under § 1988; however, that party should not recover attorney's fees if the victory was *de minimis* or purely technical.[79] The plaintiff, Joseph Farrar, sued various state officials, including the Lieutenant Governor of Texas ("Hobby").[80] Farrar alleged that the state officials maliciously prosecuted him and conspired to close his school for delinquent teens during his indictment for the death of one of his students.[81] Farrar

73. *See, e.g.*, Mercer—Dist. Ct. III, 301 F. Supp. 2d 454, 462-63 (M.D.N.C. 2004) (highlighting differing views among circuit courts over attorney's fees in nominal-recovery cases).

74. *See* 42 U.S.C. § 1988(b) (providing that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . ."); *see also* Phelps v. Hamilton, 120 F.3d 1126, 1129 (10th Cir. 1997) (reviewing § 1988 fee award and stating that "the ultimate decision to award fees rests within the district court's discretion . . .").

75. *See Mercer—Dist. Ct. III*, 301 F. Supp. 2d at 462-63 (noting different interpretations among lower courts of § 1988 attorney's fees).

76. *See* 506 U.S. at 116 (holding civil rights plaintiff who recovered only nominal damages was "prevailing party" under § 1988, but could not recover attorney's fees because victory was purely "technical").

77. For a further discussion of the lower courts' analysis of attorney's fees in nominal-recovery cases, see *supra* notes 40-50 and accompanying text.

78. *See Farrar*, 506 U.S. at 105 (stating issue of case).

79. *See id.* at 121 (O'Connor, J., concurring) ("That is not to say that *all* nominal damages awards are *de minimis*. Nominal relief does not necessarily a nominal victory make.").

80. *See id.* at 105-06 (providing background facts of case).

81. *See id.* (noting district court dismissed Farrar's indictment charge before Farrar brought suit); *see also* Estate of Farrar v. Cain, 941 F.2d 1311, 1312 (5th Cir. 1991) (setting forth facts of case).

sought $17 million in damages under 42 U.S.C. §§ 1983 and 1985 for alleged violations of his due process rights.[82]

The United States Supreme Court affirmed the Fifth Circuit's denial of fees, but acknowledged that the plaintiff was a prevailing party.[83] While the Court prohibited the plaintiff from recovering fees, it implicitly recognized instances where a prevailing party obtaining only nominal damages should nevertheless recover attorney's fees.[84] Justice O'Connor's concurring opinion helped clarify the majority's holding.[85] The concurring opinion aided lower courts in "separat[ing] the usual nominal-damage case, which warrants no fee award, from the unusual case that does warrant an award of attorney's fees."[86]

The majority in *Farrar* began its analysis of prevailing party status by examining relevant Supreme Court precedent.[87] The *Farrar* Court first considered *Hensley v. Eckerhart*, the first Supreme Court case to address recovery of § 1988 attorney's fees where the party did not prevail on all of its claims.[88] In *Hensley*, the Court concluded that "plaintiffs may be considered prevailing parties . . . if they succeed on any significant issue in litigation which achieves

82. *See Farrar*, 506 U.S. at 105-06 (explaining background and facts of case). Farrar filed suit in the United States District Court for the Southern District of Texas. *See id.* at 106. Joseph Farrar was the original plaintiff; however, after his death, the co-administrators of his estate substituted Dale Farrar and Pat Smith as plaintiffs. *See id.* The district court, following a jury trial, held that the plaintiffs would recover nothing and dismissed the action on the merits. *See id.* at 106-07. Nevertheless, the United States Court of Appeals for the Fifth Circuit remanded to the district court to enter judgment against Hobby for nominal damages, because the jury concluded that Hobby deprived Farrar of a civil right. *See id.* at 107 (explaining procedural history of case). On remand, the district court awarded plaintiffs $280,000 in attorney's fees, $27,932 in expenses, and $9,730 in prejudgment interest against Hobby. *See id.* at 107. On appeal again, the Fifth Circuit reversed the fee award, finding that plaintiffs were not a prevailing party under § 1988 and thus, were ineligible for attorney's fees. *See id.* (quoting *Cain*, 941 F.2d at 1315).

83. *See id.* at 105 (stating holding of majority). The Supreme Court held that the Fourth Circuit erred in finding that the plaintiffs were not a prevailing party. *See id.* at 113.

84. *See id.* at 115 (stating that "when a plaintiff recovers only nominal damages . . . the only reasonable fee is *usually* no fee at all" (emphasis added) (internal citation omitted)).

85. *See id.* at 116 (O'Connor, J., concurring) (joining Court's opinion, but writing to further explain denial of fees to plaintiffs). Justice O'Connor provided the necessary fifth vote for the majority opinion. *See id.*

86. Mercer III, 401 F.3d 199, 204 (4th Cir. 2005) (applying O'Connor factors to evaluate district court's award of attorney's fees to plaintiff).

87. *See Farrar*, 506 U.S. at 109-12 (majority op.) (explaining that Supreme Court defined prevailing party status in three earlier cases).

88. *See* 461 U.S. 424, 440 (1983) (holding that plaintiff who recovered on five of six claims should recover attorney's fees, but only for hours spent litigating successful claims, not unsuccessful claims).

some of the benefit the parties sought in bringing suit."[89] Consequently, *Hensley* recognized that a plaintiff can qualify as a prevailing party, even if the plaintiff does not succeed on all of the plaintiff's claims.[90]

Next, the *Farrar* Court considered *Hewitt v. Helms*, in which the Supreme Court concluded that the plaintiff was not a prevailing party under § 1988 because a prevailing party must show "the settling of some dispute which affects the behavior of the defendant towards the plaintiff."[91] Similarly, in *Rhodes v. Stewart*, the Court denied prevailing party status to two plaintiffs who obtained a declaratory judgment only, explaining that a declaratory judgment "will constitute relief, for purposes of [Section] 1988, if, and only if, it affects the behavior of the defendant toward the plaintiff."[92]

Finally, the *Farrar* Court addressed *Texas State Teachers Ass'n v. Garland Independent School District*,[93] in which the Supreme Court rejected the theory that a plaintiff must win on the "central issue" of the case to qualify as a prevailing party.[94] Instead, the *Garland* Court concluded that "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties."[95]

From this foundational framework, the majority in *Farrar* announced the following standard for prevailing party status: "A plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff."[96] Consequently, the Court identified three main requirements for a plaintiff to be considered a prevailing party: (1) the plaintiff obtained at least some relief on the merits of its claim; (2) the plaintiff

89. *Farrar*, 506 U.S. at 109 (quoting *Hensley*, 461 U.S. at 433) (internal punctuation omitted) (explaining criteria for prevailing party status under § 1988).

90. *See Hensley*, 461 U.S. at 433 (clarifying standard for prevailing party status). According to the Court in *Hensley*, "a prevailing plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" *Id.* at 429 (quoting S. Rep. No. 94-1011, at 4 (1976)).

91. *Farrar*, 506 U.S. at 109-10 (quoting Hewitt v. Helms, 482 U.S. 755, 761 (1987)) (examining relevance of *Hewitt* to present issue).

92. *Id.* at 110 (quoting Rhodes v. Stewart, 488 U.S. 1, 4 (1988) (per curiam)) (addressing Court precedent on attorney's fees recovery under § 1988).

93. 489 U.S. 782 (1989).

94. *See Farrar*, 506 U.S. at 111 (citing *Garland*, 489 U.S. at 791) (summarizing holding in *Garland* regarding prevailing party status).

95. *Id.* (quoting *Garland*, 489 U.S. at 792) (summarizing *Garland* holding on prevailing party status).

96. *Id.* at 111-12 (declaring standard for prevailing party determination of plaintiff under § 1988).

obtained "an enforceable judgment against the defendant from whom the fees are sought;" and (3) the relief the plaintiff secured must affect the defendant's behavior in a way that is relevant to the plaintiff.[97]

Based on this definition of a prevailing party, the *Farrar* Court announced that an award of only nominal damages unequivocally qualifies a party as prevailing.[98] Further, the Court held that the *amount* of damages that a party recovers has no bearing on the prevailing party determination.[99]

Nevertheless, the majority then addressed the reasonableness of the fee award, asserting that reasonableness depends on "the degree of success obtained" by the plaintiff.[100] According to the majority, a court could determine the plaintiff's degree of success by comparing the amount of damages actually awarded to the plaintiff with the amount the plaintiff sought.[101] From this comparison, the majority reasoned that where a plaintiff's recovery was technical or minimal, the deciding court can "lawfully award low fees or no fees" without having to first calculate the lodestar amount or apply the twelve factors bearing on reasonableness.[102] Thus, the majority created a limited exception for calculating attorney's fees under § 1988: where a prevailing plaintiff recovers only nominal damages and the victory was merely technical or *de minimis*, the lower court can determine the amount of fees within its discretion, dispensing with the lodestar calculation.[103]

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97. *Id.* at 111 (summarizing interpretation of legal elements for prevailing party status).

98. *See id.* at 113 (concluding that "[a] judgment for damages in any amount, whether compensatory or nominal, modifies the defendant's behavior for the plaintiff's benefit . . . ").

99. *See Farrar,* at 113-14 ("[W]e hold that the prevailing party inquiry does not turn on the magnitude of the relief obtained. We recognized as much in *Garland* when we noted that 'the *degree* of the plaintiff's success' does not affect 'eligibility for a fee award.'" (quoting *Garland,* 489 U.S. at 790)).

100. *See id.* at 114 ("'[T]he most critical factor' in determining the reasonableness of a fee award 'is the degree of success obtained.'" (quoting Hensley v. Eckerhart, 461 U.S. 424, 436 (1983))).

101. *See id.* (explaining that "'[w]here recovery of private damages is the purpose of . . . civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought.'" (Powell, J., concurring in judgment) (alteration in original) (quoting Riverside v. Rivera, 477 U.S. 561, 585 (1986)).

102. *See id.* at 115 (citing *Hensley,* 461 U.S. at 430, n.3, 433) (providing courts with exemption from technical fee-calculation where damage awards are minimal).

103. *See id.* (explaining that "[a] plaintiff who seeks compensatory damages but receives no more than nominal damages is often such a prevailing party"); *see also* Morales v. City of San Rafael, 96 F.3d 359, 362-63 (9th Cir. 1996) (explicating meaning of "*Farrar* exception" and reversing district court's holding that plaintiff's

D. The O'Connor Factors

While the majority opinion in *Farrar* established that nominal damage awards can satisfy prevailing party status, it was not particularly clear what circumstances would warrant such an award.[104] Specifically, the majority opinion provided little guidance to courts on how to distinguish between victories that are merely technical or *de minimis*, thus deserving no award, from victories that are exceptionable, thus warranting an award.[105] In her concurring opinion, Justice O'Connor outlined three factors (the "O'Connor factors") to aid courts in deciding whether the plaintiff's victory was *de minimis* or particularly significant.[106] According to Justice O'Connor, "the relevant indicia of success" are: (1) the extent of the relief the plaintiff obtained; (2) the magnitude of the legal issue on which the plaintiff prevailed; and (3) the public purpose served by the case.[107]

The first O'Connor factor, the extent of plaintiff's relief, requires a court to compare the recovery the plaintiff sought in bringing suit, with the recovery the plaintiff actually obtained.[108] Consequently, "a substantial difference between the judgment recovered and the recovery sought suggests that the victory is in fact purely technical."[109] Justice O'Connor based this conclusion on

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recovery was nominal), *opinion amended on other grounds*, 108 F.3d 981, 981 (9th Cir. 1997).

104. *See, e.g.*, Mercer III, 401 F.3d 199, 203 (4th Cir. 2005) (noting lack of guidance in majority opinion on appropriate circumstances for awarding attorney's fee).

105. *See Farrar*, 506 U.S. at 116 (O'Connor, J., concurring) (explaining reason for writing separately was to clarify majority's decision denying plaintiff recovery of fees); *see also* Bean, *supra* note 62, at 589-600 (discussing *Farrar*'s lack of clarity in majority opinion and resulting discrepancy among circuit courts applying *Farrar*).

106. *See Farrar*, 506 U.S. at 122 (O'Connor, J., concurring) (summarizing three factors and concluding plaintiff's success was *de minimis*).

107. *Id.* (O'Connor, J., concurring) (recapitulating three factors courts should consider when determining plaintiff's level of success).

108. *See id.* at 120-21 (O'Connor, J., concurring) (proffering view that large difference between recovery sought by plaintiff and recovery actually obtained indicates technical nature of victory).

109. *Id.* at 121 (O'Connor, J., concurring) (reinforcing majority's position that some prevailing parties under § 1988 should not recover attorney's fees). Justice O'Connor recognized that some nominal damage awards, despite their underlying finding of liability, were simply a "Pyrrhic" victory. *See id.* at 120. Thus, according to Justice O'Connor, "[c]himerical accomplishments are simply not the kind of legal change that Congress sought to promote in the fee statute." *Id.* at 119.

the language of § 1988, which gives district courts discretion to award fees to the prevailing party.[110]

In addition to the first factor, Justice O'Connor encouraged courts to consider two additional factors in evaluating a nominally recovering party's right to attorney's fees.[111] The second factor is "the significance of the legal issue on which the plaintiff claims to have prevailed."[112] Under this factor, a court should consider the overall effect or import of the issue decided in plaintiff's favor.[113] For instance, in *Farrar*, the Court determined that the plaintiff's victory was "hollow" and lacked any significance because the plaintiff "recover[ed] one dollar from the least culpable defendant and nothing from the [remaining five defendants]."[114] Therefore, technical victories, such as interlocutory orders, should fail the second factor of the O'Connor test.

Finally, the third factor is whether the case served some important public purpose, "other than occupying the time and energy of counsel, court, and client."[115] Justice O'Connor explained this factor in the context of the private attorney general theory, according to which the case should protect larger, valuable social rights.[116] "Section 1988 is not 'a relief Act for lawyers.' Instead, it is a tool that ensures the vindication of important rights, even when large sums of money are not at stake, by making attorney's fees available under a private attorney general theory."[117] Thus, recognizing that civil rights cases often lack damage recoveries yet can deter future

110. *See id.* at 119 (O'Connor, J., concurring) (concluding that § 1988's optional language permits court "to withhold attorney's fees from prevailing parties in appropriate circumstances . . . ."). Section 1988 provides in relevant part that, "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . . ." 42 U.S.C. § 1988(b) (2000).

111. *See Farrar*, 506 U.S. at 122 (O'Connor, J., concurring) (providing courts with two additional factors for determining propriety of fee award).

112. *Id.* at 121 (O'Connor, J., concurring) (citing Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792 (1989)) (explicating second factor).

113. *See id.* (O'Connor, J., concurring) (applying second factor to facts of case to determine importance of plaintiff's victory).

114. *Id.* (O'Connor, J., concurring) (evaluating plaintiffs' alleged victory and concluding victory was "a hollow one").

115. *Id.* at 121-22 (O'Connor, J., concurring) (stating third factor courts should consider in nominal award cases).

116. *See Farrar*, 506 U.S. at 122 (O'Connor, J., concurring) (requiring case to fulfill larger public purpose pursuant to third factor).

117. *Id.* (O'Connor, J., concurring) (quoting City of Riverside v. Rivera, 477 U.S. 561, 588 (1986) (Rehnquist, J., dissenting)) (explaining policy reasons underlying § 1988).

constitutional violations, a court should evaluate the case's larger social and legal ramifications to determine its significance.[118]

E. Application of the O'Connor Factors: The Circuit Split

While almost all of the federal circuit courts of appeals adopted Justice O'Connor's guidelines from *Farrar*, the courts are not in unison in applying and interpreting these guidelines.[119] The first factor, the extent of the plaintiff's relief, is the most straightforward and universally interpreted of the three factors.[120] Neverthe-

118. *See id.* at 121-22 (recognizing larger issues Congress addressed in passing § 1988). For a discussion of the policy issues implicated in recovery of attorney's fees under Title IX, see Rombeau, *supra* note 8, at 1202-06.

119. *See* Bean, *supra* note 62, at 596 (examining lack of uniformity among federal courts in applying three O'Connor factors). Presently, the First, Third, Fourth, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits have explicitly adopted the O'Connor factors for determining whether a prevailing plaintiff who recovers only nominal damages will receive attorney's fees under § 1988. *See* Díaz-Rivera v. Rivera-Rodríguez, 377 F.3d 119, 125 (1st Cir. 2004) (upholding district court's award of attorney's fees to plaintiff based on three O'Connor factors); Buss v. Quigg, 91 F. App'x 759, 761 (3d Cir. 2004) (citing O'Connor factors for assessing whether plaintiff with nominal damage award should recover attorney's fees); Mercer II, 50 F. App'x 643, 646 (4th Cir. 2002) (remanding to district court to decide availability of attorney's fees according to O'Connor factors); Hidden Oaks Ltd. v. City of Austin, 138 F.3d 1036, 1052-53 (5th Cir. 1998) (upholding denial of attorney's fees to plaintiff because of third O'Connor factor, lack of public benefit); Cartwright v. Stamper, 7 F.3d 106, 109-10 (7th Cir. 1993) (holding that three O'Connor factors should guide court in prevailing party inquiry); Jones v. Lockhart, 29 F.3d 422, 423-24 (8th Cir. 1994) (applying O'Connor factors to assess reasonableness of attorney's fees award to partially successful plaintiff); Morales v. City of San Rafael, 96 F.3d 359, 361 (9th Cir. 1996) (overruling district court's calculation of attorney's fees because of failure to consider second and third O'Connor factors); Phelps v. Hamilton, 120 F.3d 1126, 1131-32 (10th Cir. 1997) (applying three O'Connor factors to evaluate plaintiff's success and reversing district court's holding that plaintiff should not recover any fee award). Further, the Second Circuit applies the O'Connor factors implicitly. *See* Cabrera v. Jakabovitz, 24 F.3d 372, 393 (2d Cir. 1994) (upholding fee award based on significance of legal issue on which plaintiff prevailed and accomplishment of public purpose). Thus, only the Sixth, Eleventh, and D.C. Circuits do not follow the O'Connor factors in determining whether a nominally awarded plaintiff is a prevailing party for purposes of attorney's fees under § 1988. For an additional discussion of the circuit courts' treatment of *Farrar*, see Bean, *supra* note 62, at 589-600.

120. *See, e.g.*, Wilcox v. City of Reno, 42 F.3d 550, 554 (9th Cir. 1994) ("*Farrar* establishes that a district court should give primary consideration to the degree of success achieved when it decides whether to award attorney's fees."); *see also* Briggs v. Marshall, 93 F.3d 355, 361 (7th Cir. 1996) ("[T]he most significant of the three factors is the difference between the judgment recovered and the recovery sought." (citing Maul v. Constan, 23 F.3d 143, 145 (7th Cir. 1994)). Because both the majority and Justice O'Connor indicated in *Farrar* that the extent of plaintiff's relief should be measured by comparing the amount of relief the plaintiff sought against the amount of relief the plaintiff actually obtained, courts apply this factor easily. *See* Bean, *supra* note 62, at 596 (noting court's relative consistency in applying first O'Connor factor).

less, the courts diverge over the appropriate weight they should give to this factor.[121]

The courts of appeals also interpret the second O'Connor factor, the significance of the legal issue on which plaintiff prevailed, with considerable variation.[122] Many circuits construe "significance" as the overall importance of the legal issue, basing their assessments on the effect of, or reasons why, the plaintiff prevailed, instead of on a numerical calculation of the plaintiff's successful claims.[123] Other circuits, however, view "significance" as the extent to which the plaintiff prevailed on the asserted claims, often involving a comparison of the number of plaintiff's successful claims versus unsuccessful claims.[124]

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121. *Compare Briggs*, 93 F.3d at 361 (upholding denial of attorney's fees to plaintiff who sought $75,000 in damages but recovered four dollars, explaining first factor is "most significant"), *with Díaz-Rivera*, 377 F.3d at 125 (emphasizing importance of second and third O'Connor factors in upholding fee award to partially successful plaintiff). The *Díaz-Rivera* Court explained: "[T]he Supreme Court has explicitly 'reject[ed] the proposition that fee awards under § 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers.'" *Díaz-Rivera*, 377 F.3d at 125 (alteration in original) (quoting *Rivera*, 477 U.S. at 574 (1986) (affirming district court's award of fees based on conclusion that case served "important public purpose").

122. *See, e.g.*, Mercer—Dist. Ct. III, 301 F. Supp. 2d 454, 462 (M.D.N.C. 2004) (noting "undefined" state of second O'Connor factor among federal courts).

123. *See, e.g.*, Mercer III, 401 F.3d 199, 206 & n.5 (4th Cir. 2005) (interpreting significance of legal issue as "general legal importance of the issue on which plaintiff prevailed" (citing *Constan*, 23 F.3d at 145)); *see also Buss*, 91 F. App'x at 761 (upholding district court's conclusion that unreasonable search and seizure constitutes legally significant issue); Murray v. City of Onawa, 323 F.3d 616, 619 (8th Cir. 2003) (holding investigations of alleged police abuse and misconduct constitute "significant legal issues"); Milton v. City of Des Moines, 47 F.3d 944, 946 (8th Cir. 1995) (finding plaintiff's prevailing claim of cruel and unusual punishment significant, distinguishing from injury to business considered in *Farrar*); *Cabrera*, 24 F.3d at 393 (concluding racial steering was significant issue); *Maul*, 23 F.3d at 145 ("[W]e understand the second *Farrar* factor to address the legal import of the constitutional claim on which plaintiff prevailed."). *But see Briggs*, 93 F.3d at 361 (holding second factor "evaluates the extent to which the plaintiffs succeeded on their claims").

124. *See* Barber v. T.D. Williamson, Inc., 254 F.3d 1223, 1231 (10th Cir. 2001) (stating "[t]he second factor . . . goes beyond the actual relief awarded [which is the focus of the first factor] to examine the *extent* to which the plaintiff[ ] succeeded on [his] theory of liability" (alterations in original) (emphasis added) (quoting Phelps v. Hamilton, 120 F.3d 1126, 1132 (10th Cir. 1997))); *see also Briggs*, 93 F.3d at 361 (tallying total number of claims on which plaintiff prevailed, compared with total number of asserted claims). *But see* Hyde v. Small, 123 F.3d 583, 585 (7th Cir. 1997) (holding that suit's small damage award and failure to set new constitutional standard did not mean suit was insignificant); Riley v. City of Jackson, 99 F.3d 757, 759-60 (5th Cir. 1996) (concluding plaintiff-appellants' recovery was significant based on success of plaintiff's particular claims). "[T]he cumulative effect of petty violations of the Constitution . . . on the values protected by the Constitution may not be petty . . . ." *Hyde*, 123 F.3d at 585.

To add further complexity to the issue, the third O'Connor factor, the accomplishment of a public purpose, has caused the greatest discrepancy among § 1988 prevailing party cases. The circuit courts are split in their interpretation of the third factor, divided generally into two different schools of thought: (1) those that view the public purpose strictly, and are therefore predisposed to not award attorney's fees; and (2) those that view the public purpose more liberally, thus interpreting achievement of a public purpose expansively.[125] Under the strict view, the courts interpret accomplishment of a public purpose as requiring more than some tangential or hypothetical benefit of the litigation.[126] For example, the Second Circuit declared an explicitly narrow interpretation of the public benefit in *Pino v. Locascio*.[127] In *Pino*, the court refused to grant attorney's fees to the plaintiff who sought approximately $21 million in damages, but ultimately recovered only one dollar.[128] Despite concluding that the plaintiff did not qualify as a prevailing party, the court added that an award of attorney's fees to a plaintiff who recovers nominal damages should be the exception, rather than the rule.[129] In *Cabrera v. Jakabovitz*, the Second Circuit awarded attorney's fees to the nominally-recovering plaintiff.[130] The court explained that *Cabrera* was unique and thus was a limited holding because "[the plaintiff's] lawsuit created a new rule of liability that served a significant public purpose."[131] Consequently,

125. *See Barber*, 254 F.3d at 1231-32 (highlighting circuit split over interpretation of third O'Connor factor); *see also Mercer—Dist. Ct. III*, 301 F. Supp. 2d at 462-63 (noting circuits' different views on third O'Connor factor). For an additional discussion of the federal courts' interpretations of the third O'Connor factor, see Bean, *supra* note 62, at 598-600.

126. *See, e.g.*, Hidden Oaks Ltd. v. City of Austin, 138 F.3d 1036, 1052 (5th Cir. 1998) (refusing attorney's fees to plaintiff that prevailed on procedural due process claim because claim did not serve larger public purpose); *Briggs*, 93 F.3d at 361 (stating plaintiff's mere establishment that constitutional right was violated serves little to no public purpose); Pino v. Locascio, 101 F.3d 235, 239 (2d Cir. 1996) (holding that "not every tangential ramification of civil rights litigation *ipso facto* confers a benefit on society"); *Constan*, 23 F.3d at 146 (finding no public purpose served because plaintiff brought suit only for vindication of personal rights).

127. 101 F.3d at 239 (plaintiff's case served no public purpose).

128. *See id.* at 238-39 (stating holding).

129. *See id.* at 238 (citing Farrar v. Hobby, 506 U.S. 103, 115 (1992)) ("[W]hile there is no *per se* rule that a plaintiff recovering nominal damages can never get a fee award, *Farrar* indicates that the award of fees in such a case will be rare.").

130. 24 F.3d 372, 393 (2d Cir. 1994) (awarding attorney's fees to plaintiff because litigated issue was significant and served important public purpose).

131. *Pino*, 101 F.3d at 239 (limiting public purpose holding in *Cabrera*). In distinguishing the facts in *Pino*, the court reasoned that "*Cabrera* accomplished more than giving the plaintiff's '[m]oral satisfaction . . . .'" *Id.* Thus, the *Pino* Court easily concluded that the plaintiff's one successful claim and one dollar in

under the Second Circuit's view of the public purpose factor, "[t]he vast majority of civil rights litigation does not result in groundbreaking conclusions of law, and therefore, will only be appropriate candidates for fee awards if a plaintiff recovers some significant measure of damages or other meaningful relief."[132]

In contrast, numerous other circuits interpret the third O'Connor factor quite generously, resulting in a wide range of circumstances which qualify as accomplishing a public purpose.[133] Under this view, the courts follow the private attorney general theory, according to which a plaintiff's successful suit vindicates not merely the plaintiff's individual interests, but also serves the larger public good in some way.[134] Thus, courts following this view analyze whether the ultimate holding of the case has a beneficial impact on others, deters future violations of the same nature, or sparks the change necessary to ensure the proper protection of fundamental, constitutional rights.[135]

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damages failed to make her case a "rare exception." *Id.* at 238. "The only way Pino could have been less successful is if she had lost altogether . . . ." *Id.*

132. *Id.* at 239 (explaining rationale for denying attorney's fees to plaintiff).

133. *See, e.g.*, O'Connor v. Huard, 117 F.3d 12, 18 (1st Cir. 1997) (holding plaintiff's victory accomplished public purpose because it provided incentive to attorneys to represent civil rights plaintiffs and had deterrent effect on possible future violators); Muhammad v. Lockhart, 104 F.3d 1069, 1070 (8th Cir. 1997) (finding plaintiff accomplished public goal in "encouraging governments scrupulously to perform their constitutional duties"); Hashimoto v. Dalton, 118 F.3d 671, 680 (9th Cir. 1997) (upholding liberal public policy interpretation); Piper v. Oliver, 69 F.3d 875, 877 (8th Cir. 1995) (determining plaintiff's victory served public purpose by encouraging defendants to change forfeiture procedures to ensure their legality); Wilcox v. City of Reno, 42 F.3d 550, 555 (9th Cir. 1994) (commenting plaintiff's case serves public purpose if it changes public policy or has potential collateral estoppel effects); Cartwright v. Stamper, 7 F.3d 106, 110-11 (7th Cir. 1993) (holding public purpose is served if plaintiff's suit addressed egregious violation or deters future conduct).

134. *See, e.g.*, Jones v. Lockhart, 29 F.3d 422, 424 (8th Cir. 1994) ("[C]ivil rights litigation serves an important public purpose; '[a] plaintiff bringing a civil rights action does so not for himself alone but also as a private attorney general,' vindicating a policy that Congress considered of the highest priority." (alteration in original) (quoting Casey v. City of Cabool, 12 F.3d 799, 805 (8th Cir. 1993))).

135. *See* Bean, *supra* note 62, at 598 (summarizing circuit courts' interpretation of third O'Connor factor). According to the Tenth Circuit, the "accomplishment of a public goal need not involve a benefit to the entire general public." Barber v. T.D. Williamson, Inc., 254 F.3d 1223, 1233 n.6 (10th Cir. 2001) (relying on Koopman v. Water Dist. No. 1, 41 F.3d 1417 (10th Cir. 1994), and Brandau v. Kansas, 168 F.3d 1179, 1183 (10th Cir. 1999)). Under *Brandau*, a "[p]laintiff's vindication of her civil rights and of important rights of her co-workers" is a sufficient public benefit. 168 F.3d at 1183 (citing *Koopman*, 41 F.3d at 1421).

IV. NARRATIVE ANALYSIS

In *Mercer III*, the Fourth Circuit addressed whether the district court erred in awarding attorney's fees to the nominally-recovering plaintiff, Mercer, for her Title IX suit.[136] Defendant-Appellant Duke contended because of Mercer's "very limited degree of success," the *Farrar* standard dictated she should not receive attorney's fees.[137] Applying *Farrar*, the *Mercer III* Court first addressed whether Mercer was in fact a prevailing party under § 1988.[138]

The court began with *Farrar's* well-known principle that, "a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff."[139] Further, according to *Farrar*, a party prevails if it has obtained a "judgment for damages in any amount, whether compensatory or nominal."[140] Based on these principles, the *Mercer III* Court concluded that Mercer's recovery of nominal damages qualified her as a prevailing party.[141]

Despite the court's straightforward determination that Mercer prevailed for purposes of § 1988, the *Mercer III* Court next addressed the more difficult question of whether Mercer's suit crossed the threshold of technical victories to justify an award of attorney's fees.[142] The court explained, "[a]lthough Mercer is a prevailing party, the district court has discretion to determine what constitutes a reasonable fee, a determination that requires the court to consider the extent of the plaintiff's success."[143]

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136. *See* Mercer III, 401 F.3d 199, 200 (4th Cir. 2005) (explaining issue on appeal).

137. *Id.* at 203 (describing parties' respective positions). Duke relied on language from the majority opinion in *Farrar*, in which the Supreme Court stated: "In some circumstances, even a plaintiff who formally 'prevails' under § 1988 should receive no attorney's fees at all. A plaintiff who seeks compensatory damages but receives no more than nominal damages is often such a prevailing party . . . ." *Id.* (quoting Farrar v. Hobby, 506 U.S. 103, 115 (1992)).

138. *See id.* (considering first step of analysis in recovery of § 1988 attorney's fees).

139. *Id.* (quoting *Farrar*, 506 U.S. at 111-12) (applying *Farrar* standard for prevailing party determination).

140. *Id.* (quoting *Farrar*, 506 U.S. at 113) (recognizing principle espoused in *Farrar* that nominal damage award satisfies prevailing party status under § 1988).

141. *See Mercer III*, 401 F.3d at 203 (concluding Mercer is prevailing party under § 1988).

142. *See id.* (clarifying prevailing party status determined Mercer's eligibility, rather than her entitlement, to fees).

143. *Id.* (noting prevailing party inquiry is only first part of attorney's fees determination). The *Mercer III* Court followed the majority approach in *Farrar*, first determining whether the plaintiff was a prevailing party and then assessing the

To assess the reasonableness of the district court's fee award, the *Mercer III* Court invoked the O'Connor factors.[144] Beginning with the first factor, the extent of the relief obtained by the plaintiff, the court compared the amount of damages sought with the amount Mercer actually obtained.[145] The court rejected the district court's interpretation, finding the district court erroneously emphasized "Mercer's subjective motives in pursuing the litigation."[146]

While the district court compared the relief Mercer sought against the relief she actually obtained, it concluded that Mercer's success was not *de minimis* "[b]ecause [she] achieved the primary result that she sought. . . ."[147] The *Mercer III* Court, however, rejected the district court's interpretation, finding it contrary to Supreme Court precedent.[148] According to the Fourth Circuit, focusing on a plaintiff's primary purpose for bringing suit entails a necessarily subjective inquiry, a consideration the courts should generally not entertain.[149]

Thus, under the first O'Connor factor, a court should not consider the *primary* relief a plaintiff sought because the court would need to determine the plaintiff's purposes for bringing suit.[150] Instead, a court should consider all the relief the plaintiff sought and

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amount of fees, if any, the plaintiff should recover. *See id. Cf. Farrar*, 506 U.S. at 114 ("Once civil rights litigation materially alters the legal relationship between the parties, 'the degree of the plaintiff's overall success goes to the reasonableness' of [the] fee award . . . .").

144. *See Mercer III*, 401 F.3d at 204 (stating O'Connor factors provide appropriate framework for decision).

145. *See id.* at 204-06 (applying first O'Connor factor). The court acknowledged that in applying the first factor, it was unclear whether it should use Mercer's original requests for relief, or the relief Mercer sought when her claim went to trial. *See id.* at 204. Despite this ambiguity, the court held it was irrelevant in Mercer's case because the relief she obtained "was extremely limited." *Id.* For a critical analysis of the *Mercer III* Court's holding and reasoning, see *infra* notes 174-202 and accompanying text.

146. *Mercer III*, 401 F.3d at 204-05 (agreeing with Duke University's claim that district court misapplied first O'Connor factor).

147. *Id.* (quoting Mercer—Dist. Ct. III, 301 F. Supp. 2d 454, 461-62 (M.D.N.C. 2004)) (summarizing holding of district court).

148. *See id.* at 205 (applying Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782 (1989)). The *Mercer III* court concluded the Supreme Court in *Garland* expressly rejected the "central issue" test for prevailing party status. *See id.*

149. *See id.* (quoting *Garland*, 489 U.S. at 787) ("By focusing on the subjective importance of an issue to the litigants, [the central issue test] asks a question which is almost impossible to answer . . . ." (alterations in original)).

150. *See id.* (rejecting plaintiff's contention that *Farrar* required court to consider plaintiff's motives for assessing extent of plaintiff's relief).

compare this against the relief the plaintiff actually obtained.[151] The court reasoned that a standard which incorporated the plaintiff's subjective intent would unreasonably burden the district courts "in the same excruciating and distracting inquiry that the Supreme Court has condemned."[152] Accordingly, the court concluded that Mercer's limited recovery suggested she should not recover any fees.[153]

The court next addressed the second O'Connor factor, "the significance of the legal issue on which the plaintiff prevailed."[154] The court asserted that "significance" referred to the general overall legal import of the successful claim.[155] Rejecting the Tenth Circuit's reading of the second O'Connor factor, which objectively evaluated the significance of the prevailing claims, the *Mercer III* Court held that "significance" referred to the overall legal import of the claim.[156] As such, the court affirmed the district court's conclusion that Mercer prevailed on a significant legal issue.[157] "Mercer's

151. *See Mercer III*, 401 F.3d at 205 (applying Farrar v. Hobby, 506 U.S. 103, 114-15 (1992)) (interpreting first O'Connor factor as addressing overall relief plaintiff sought, instead of primary focus of litigation).

152. *Id.* at 206 (quoting *Garland*, 489 U.S. at 791) (internal quotations omitted) (upholding rationale espoused in *Garland* for rejecting "central issue" test). The *Mercer III* Court acknowledged that under *Farrar*, a court may need to consider the purpose of the lawsuit in order to determine the extent of the relief obtained. *See id.* (citing *Farrar*, 506 U.S. at 114). "Where recovery of private damages is *the purpose* of civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought." *Id.* at 204 (quoting *Farrar*, 506 U.S. at 114). Nevertheless, the court concluded that the *Farrar* Court's reference to "the purpose of the suit" was intended to distinguish actions for monetary damages, from actions seeking declaratory or injunctive relief. *See id.* at 205.

153. *See id.* at 206 (stating conclusion under first O'Connor factor). Despite finding that the district court erroneously interpreted the first factor, the *Mercer III* Court held that this error was insignificant because it would not have changed the court's final decision. *See id.* at n.4.

154. *Id.* (quoting *Farrar*, 506 U.S. at 122 (O'Connor, J., concurring) (citing second O'Connor factor)).

155. *See id.* (citing Maul v. Constan, 23 F.3d 143, 145 (7th Cir. 1994)) (asserting that second O'Connor factor involves broad interpretation of "significance" of legal issue).

156. *See Mercer III*, 401 F.3d at 206 (construing second O'Connor factor).

157. *See id.* (affirming district court's conclusion that Mercer prevailed on second O'Connor factor). The court also rejected Duke's University's claim that the court should not consider *Mercer I* in its assessment of the case's significance. *See id.* Duke argued that *Mercer I* was "merely an interlocutory decision that had no bearing on Mercer's victory at trial," similar to the Supreme Court case *Hewitt v. Helms*. *Id.* at 207 (describing Duke's argument which relied on Hewitt v. Helms, 482 U.S. 755, 761 (1987)). In *Hewitt*, the plaintiff successfully appealed the district court's dismissal of his suit, but ultimately lost his case because the district court determined the defendants were entitled to qualified immunity. *See id.* (summarizing *Hewitt*, 482 U.S. at 760). The *Mercer III* Court clearly distinguished *Hewitt*,

case established that the contact-sports exemption does not permit a school to discriminate against women that the school has allowed to participate in contact sports. Mercer's case was the first to so hold, and it will serve as guidance for other schools facing the issue."[158] Consequently, the *Mercer III* Court concluded that Mercer's victory represented a significant legal issue.[159] Therefore, the court held that the significance of Mercer's case suggested she should recover fees.[160]

Finally, under the third O'Connor factor, the court considered "whether the litigation served a public purpose, as opposed to simply vindicating the plaintiff's individual rights."[161] The court began by noting Title IX's important public goal of generally prohibiting gender-based discrimination in various areas of education.[162] The court then examined the particular implications of Mercer's case, concluding that her case created a new standard for the contact-sport exception.[163]

Despite acknowledging that Mercer did not seek relief "that would have extended beyond her own case," the court concluded that through *stare decisis*, Mercer's case would impact future cases involving Title IX sex discrimination.[164] The court reasoned that "[b]ecause Mercer's case was the first of its kind, *Mercer I* and the jury's verdict will serve as guidance to other schools facing similar

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asserting that Mercer's victory was the result of uncontroverted findings of liability, and not a mere interlocutory order. See *id.* The court explained, "[t]he jury's verdict, of course, does represent a factual determination that Duke was legally responsible for violating Mercer's rights under Title IX. But the facts as found by the jury gave rise to a first-of-its-kind liability determination. Thus, contrary to Duke's argument, Mercer succeeded on a significant legal issue." *Id.*

158. *Id.* at 206 (concluding that Mercer's case satisfied "significance test" of second O'Connor factor).

159. *See id.* at 206-07 (affirming district court's conclusion that Mercer prevailed on important legal issue).

160. *See id.* at 207 (announcing conclusion on second O'Connor factor).

161. *Mercer III*, 401 F.3d at 207 (citing Farrar v. Hobby, 506 U.S. 103, 121-22 (1992) (O'Connor, J., concurring)) (summarizing third O'Connor factor).

162. *See id.* (recognizing important public goal Title IX served).

163. *See id.* (noting unique issue addressed in *Mercer II*). The court explained: "Mercer's case was the first to establish that a school cannot rely on the contact-sport exemption to excuse discrimination against a woman the school has permitted to join an all-male contact-sport team." *Id.*

164. *Id.* at 208 (examining larger purposes served by Mercer's litigation). The court clarified that simply because Mercer did not seek relief extending beyond her own case, this fact would not bear upon the significance of the legal issue or the public purpose factors. *See id.* "[A] case involving the claim of a single individual, without any request for wide-ranging declaratory or injunctive relief, can have a profound influence on the development of the law and on society." *Id.*

issues."[165] Similarly, the court rejected Duke University's argument that Mercer's case actually frustrated, rather than advanced, the public interest.[166] According to Duke, the *Mercer II* Court's interpretation of the contact-sport exemption would actually discourage schools from opening previously all-male contact sports to women.[167]

The *Mercer III* Court found Duke's argument lacked merit for two main reasons.[168] First, the court reasoned that even if some schools reacted negatively to *Mercer I*, "Mercer's lawsuit broke new ground."[169] Consequently, the possibility that some schools will receive *Mercer I* negatively does not diminish the case's overall significance.[170] Second, the court invalidated Duke's assertions that Mercer's case would actually decrease women's participation in contact sports with statistics evidencing the opposite result.[171] Therefore, the court concluded that Mercer's case clearly accomplished an important public purpose, in that "it marked a milestone in the development of the law under Title IX."[172] Thus, the court held that Mercer's case warranted recovery of fees under the O'Connor factors and affirmed the district court's award.[173]

V. CRITICAL ANALYSIS

In *Mercer III*, the court followed the majority of circuit courts in utilizing the O'Connor factors to determine whether a nominally-

165. *Id.* at 208 (concluding Mercer's case served significant public purpose under third O'Connor factor).

166. *See Mercer III*, 401 F.3d at 208-09 (setting forth Appellant-Duke's claims regarding achievement of public purpose).

167. *See id.* (reciting Duke's argument that Mercer's case failed to advance public purpose).

168. *See id.* (advancing reasons for rejecting Duke's proposition that Mercer's case would lead to decreased women's participation in collegiate athletics).

169. *Id.* at 208 (upholding significance of Mercer's case in establishing new interpretation of contact-sports exemption).

170. *See id.* (suggesting case reaches well beyond Mercer individually).

171. *See Mercer III*, 401 F.3d at 208 (citing examples of increased female participation in contact sports, including football, following *Mercer I*). The court explained, "[a] little research reveals that, even after the jury's verdict in Mercer's case, others have continued to hike along the trail that Mercer blazed." *Id.* The court offered various statistics showing women's increased involvement in traditionally male-dominated sports, including the fact that over 10,000 high school girls participated in male-oriented sports including 3,000 who play football, ice hockey, and wrestling. *See id.*

172. *Id.* at 207 (holding Mercer's victory was neither technical nor *de minimis* despite recovering only nominal damages).

173. *See id.* at 209 (announcing holding of case).

recovering plaintiff should recover attorney's fees.[174] The court's interpretation of the O'Connor factors, along with its reasoned analysis, serves as excellent guidance for other courts faced with this issue.[175] Nevertheless, because of the rather subjective and vague guidelines espoused in the O'Connor factors and the majority opinion in *Farrar*, courts can vary significantly in both their interpretation of the factors and in their ultimate decision of whether to award fees.[176]

In applying the first factor, which is considered the most straightforward of the three,[177] the *Mercer III* Court expressly rejected the district court's interpretation of this factor.[178] While both courts agreed that the first factor requires a court to examine the relief the plaintiff sought with the relief the plaintiff ultimately obtained, the courts differed in their analytical approaches.[179] The *Mercer III* Court correctly criticized the district court's interpretation as inappropriately focused on the subjective motivations of the plaintiff.[180] The district court used a "primary purpose" test, in which it evaluated Mercer's success by whether she prevailed on her primary or central claim.[181] According to the *Mercer III* Court, the first factor requires a strict analysis of all the relief the plaintiff sought, compared to the relief the plaintiff actually obtained.[182]

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174. *See id.* at 204 (stating it will apply O'Connor factors to case). For an in-depth discussion of the circuit courts' application of the O'Connor factors, see *supra* notes 119-35 and accompanying text.

175. *See, e.g.*, Zeuner v. Rare Hospitality Int'l, Inc., 386 F. Supp. 2d 635, 638 (M.D.N.C. 2005) (considering *Mercer III* in deciding plaintiff's right to attorney's fees in sexual discrimination suit); Broccoli v. Echostar Commc'ns Corp., 229 F.R.D. 506, 514-15 (D. Md. 2005) (following *Mercer III's* interpretation of O'Connor factors for determining attorney's fees in nominal-recovery case).

176. *See, e.g.*, Bean, *supra* note 62, at 589-601 (examining varying interpretations of courts in applying *Farrar*).

177. *See id.* at 596 (discussing first O'Connor factor as applied by district courts).

178. *See Mercer III*, 401 F.3d at 204-05 (reviewing district court's analysis of extent of plaintiff's relief).

179. *See id.* (criticizing district court's interpretation of first O'Connor factor).

180. *See id.* (stating reasons why district court misinterpreted first O'Connor factor).

181. *See id.* (explaining weaknesses of district court's approach). The district court held the primary relief Mercer sought was a finding of liability against Duke for its violations of Title IX. *See* Mercer—Dist. Ct. III, 301 F. Supp. 2d 454, 461 (M.D.N.C. 2004). Therefore, it concluded despite Mercer obtaining significantly less relief than what she sought, she prevailed on her primary goal, and thus, her success was not *de minimis*. *See id.* at 461.

182. *See Mercer III*, 401 F.3d at 205 (explaining scope of inquiry for first O'Connor factor).

The *Mercer III* Court's approach accurately reflects the overarching principle in *Farrar*: to prevent recovery of attorney's fees in cases where the plaintiff's success was purely technical.[183] Further, the *Mercer III* Court's approach ensures a more even-handed assessment of the case because the other two O'Connor factors consider additional indicia of success.[184] While the district court's analysis focused on the plaintiff's primary purpose for bringing suit, the *Mercer III* Court's approach ensures that the tests for the first and second factor are not conflated.[185]

Likewise, the *Mercer III* Court appropriately interpreted the second O'Connor factor, the significance of the legal issue, by concentrating on the case's overall legal import.[186] The court acknowledged the difference in the Tenth Circuit's approach, which defines significance as the extent of the plaintiff's victory, rather than the importance of the plaintiff's victory.[187] The *Mercer III* Court correctly noted that the Tenth Circuit's approach tends to conflate the first and second factors.[188] Moreover, the Tenth Circuit's approach places too much emphasis on the plaintiff's technical success, and too little emphasis on the larger principles involved in the case.[189]

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183. *See* Farrar v. Hobby, 506 U.S. 103, 119 (1992) (O'Connor, J., concurring) (arguing language of § 1988 and earlier case law reflects belief that fees should be denied to "Pyrrhic victors"). Notably, the *Farrar* Court explicitly held a wide discrepancy between what the plaintiff sought and actually recovered would indicate the *de minimis* nature of the recovery. *See id.* at 120-21.

184. *See id.* at 121 (O'Connor, J., concurring) (stating other factors should be considered, in addition to difference between amount sought and amount recovered).

185. *See, e.g.*, Bean, *supra* note 62, at 600-02 (positing most reliable way of determining propriety of attorney's fee is strict comparison between amount plaintiff recovered and damages plaintiff sought).

186. *See Mercer III*, 401 F.3d at 206-07 (applying second factor).

187. *See id.* at 206 n.5 (relying on Barber v. T.D. Williamson, Inc., 254 F.3d 1223, 1231 (10th Cir. 2001)) (criticizing Tenth Circuit's interpretation of second O'Connor factor). According to the court in *Barber*, the Tenth Circuit's view of the second factor focuses on whether the plaintiff prevailed on his or her "primary claim." *See Barber*, 254 F.3d at 1231. In response, the *Mercer III* Court argued that the Tenth Circuit's view "would require an inquiry into the subjective motives of the plaintiff, an approach that [the Fourth Circuit] ha[s] already rejected." *Mercer III*, 401 F.3d at 206 n.5.

188. *See Mercer III*, 401 F.3d at 206 n.5 (criticizing Tenth Circuit's interpretation of second O'Connor factor). The court noted, "[w]hile there may be some overlap between the second and third factors if the second factor refers to the importance of the legal issue, it seems to us that under the Tenth Circuit's approach, there is a significant overlap with the first O'Connor factor." *Id.*

189. *See id.* (noting Tenth Circuit's approach to second factor results in repeat of inquiry that first factor requires). The Court in *Hensley v. Eckerhart* expressly rejected "a mathematical approach comparing the total number of issues in the case with those actually prevailed upon." 461 U.S. 424, 435-36 n.11 (1983).

The *Mercer III* Court's interpretation of the third factor, the public purpose inquiry, conforms to the underlying factual and legal conclusions of the case.[190] In construing the public purpose broadly by recognizing the case's social and legal impact, the court harmonized its holding with the jury's findings and the district court's conclusions.[191] In short, had the court concluded that Mercer should not recover attorney's fees because her case was insignificant, its conclusion would flatly contradict both the jury's and the lower court's undisputed findings of liability.[192]

Finally, the *Mercer III* Court's liberal interpretation of the third factor tends to ensure a more just result.[193] For example, while Mercer's case did not fare well under the first factor because she obtained only nominal damages, it fully satisfied the other two factors; her case heralded a new interpretation of the contact-sport exception and signified enforcement of Title IX liability against a university.[194] If, however, the court decided *Mercer III* under the restrictive view of the third O'Connor factor, it is unlikely that Mercer would have recovered any fees.[195]

Nevertheless, while the *Mercer III* Court correctly applied the elements of *Farrar*, the *Farrar* test itself may not be a reliable standard for either district courts or plaintiffs seeking attorney's fees under § 1988.[196] Because *Farrar*'s standards are based on broad,

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The Court asserted, "[s]uch a ratio provides little aid in determining what is a reasonable fee in light of all the relevant factors. Nor is it necessarily significant that a prevailing plaintiff did not receive all the relief requested." *Id.*

190. *See Mercer III*, 401 F.3d at 207-08 (indicating lower courts' decisions provided foundation for ultimate determination that Mercer's case served public purpose). The *Mercer III* Court explained, "*Mercer I* concluded that the facts alleged by Mercer would, if believed by the jury, amount to a violation of Title IX, and *Mercer I* thus provided the framework within which the jury would operate." *Id.* at 207.

191. *See id.* (concluding jury's findings resulted in "first-of-its-kind liability determination").

192. *See id.* ("Contrary to Duke's suggestion, the decision in *Mercer I* was not merely an interlocutory decision that had no bearing on Mercer's victory at trial. . . . the facts as found by the jury gave rise to a first-of-its-kind liability determination.").

193. *See id.* at 207-08 (interpreting third O'Connor factor).

194. *See id.* (asserting significance of Mercer's case); *see also* Mercer—Dist. Ct. III, 301 F. Supp. 2d 454, 465 (M.D.N.C. 2004) (identifying important goals accomplished during Mercer's litigation).

195. *See, e.g.*, Bean, *supra* note 62, at 598-99 (examining cases decided under restrictive view of third O'Connor factor).

196. *See, e.g.*, Matthew B. Tenney, Comment, *When Does a Party Prevail?: A Proposed "Third-Circuit-Plus" Test for Judicial Imprimatur*, 2005 BYU L. REV. 429, 442-43 (2005) (examining "catalyst theory" as basis for recovering § 1988 attorney's fees and recognizing ambiguities inherent in "prevailing party" determination under *Farrar*).

vaguely defined concepts, courts applying the *Farrar* test are free to infuse their own subjectivity into the decision.[197] Subjective determinations cause unpredictable results.[198]

The unpredictability of *Farrar* is evidenced not only in *Mercer III*, but also in cases from other district courts addressing the same issue.[199] The decision to award attorney's fees may very well be fact specific and thus dependent on the individual circumstances of each case.[200] Nevertheless, the standards utilized in arriving at this decision should not be based on subjective indicia of success.[201] Unless the Supreme Court revisits this issue, the lower courts will continue interpreting the vague standards of *Farrar* and civil rights plaintiffs will be left with uncertainty.[202]

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197. *See* Barber v. T.D. Williamson, Inc., 254 F.3d 1223, 1230-32 (10th Cir. 2001) (analyzing three O'Connor factors and identifying numerous differences among courts in interpreting three factors).

198. *See, e.g.*, Bean, *supra* note 62, at 600-03 (criticizing courts' application of *Farrar* for lack of uniformity).

199. *Compare* Maul v. Constan, 23 F.3d 143, 145-47 (7th Cir. 1994) (refusing to grant plaintiff attorney's fees from due process action for forced administration of medication, where plaintiff obtained finding of liability but recovered only one dollar, stating case did not achieve larger public goal), *with* Koopman v. Water Dist. No. 1, 41 F.3d 1417, 1420-21 (10th Cir. 1994) (upholding attorney's fees to plaintiff from due process suit against District-employer, stating case had significant implications for "present and future district employees"). *See generally* ALBA CONTE, STATUTORY-FEE AWARD ENTITLEMENT, 1 Attorney Fee Awards 3d ed. § 3:3 (West 2005) (examining varied outcomes among circuit courts on § 1988 attorney's fees to partially successful plaintiffs).

200. *See Barber*, 254 F.3d at 1233 ("[A]ll three [O'Connor] factors should be given due consideration but ultimately it is within the discretion of the magistrate judge (or the district court) to determine what constitutes a reasonable fee given the particular circumstances."); Mercer III, 401 F.3d 199, 211-12 (4th Cir. 2005) (recognizing decisions awarding attorney's fees are primarily made by district court because of fact-intensive nature of inquiry). "Like the question of Mercer's entitlement to fees, the question of the reasonableness of the amount awarded is an issue entrusted to the sound discretion of the district court." *Mercer III*, 401 F.3d. at 209.

201. *See* Brandau v. Kansas, 168 F.3d 1179, 1184 (10th Cir. 1999) (Baldock, J., dissenting) (arguing O'Connor factors are "vague and indeterminate postulations [that] may be made in virtually all civil rights litigation where plaintiff is a prevailing party by virtue of a nominal damage award").

202. *Compare* Pino v. Locascio, 101 F.3d 235, 239 (2d Cir. 1996) (asserting most civil rights cases do not affect important changes in law or benefit larger society), *with* O'Connor v. Huard, 117 F.3d 12, 18 (1st Cir. 1997) (recognizing "the importance of providing an incentive to attorneys to represent litigants, such as [the plaintiff], who seek to vindicate constitutional rights but whose claim may not result in substantial monetary compensation"). For a further discussion of the circuit courts' split over O'Connor factors, see *supra* notes 119-35 and accompanying text.

VI. IMPACT

Mercer III highlights some of the latent contradictions in the *Farrar* test, as well as nascent problems in Title IX's enforcement.[203] The Fourth Circuit's holding that a private party cannot recover punitive damages in Title IX suits[204] directly affects a Title IX plaintiff's ability to recover attorney's fees.[205] Thus, there is an ironic tension in *Mercer III*: even while a plaintiff prevails, the unavailability of punitive damages, exacerbated by the unpredictable outcome for recovering attorney's fees, leaves a plaintiff like Mercer wondering if she is simply better off not bringing suit.[206]

Similarly, when a civil rights plaintiff wins, having proven a constitutional violation, the plaintiff's reward should not be a bill for thousands of dollars in attorney's fees for a suit that the plaintiff justifiably brought.[207] Such an outcome perverts the purpose and contravenes the underlying reason for § 1988's enactment.[208]

Unfortunately, the costs of litigation today largely dictate a person's options in obtaining legal recourse. Without the promise of just compensation, bringing suit simply for "the moral satisfaction of knowing that a federal court concluded that [their] rights had been violated" is often insufficient recompense.[209] As seen in *Mercer III*, while the court's award of attorney's fees depended on find-

203. *See, e.g.*, Rombeau, *supra* note 8, at 1205 (noting "seeming absurdity of the result" in district court in awarding plaintiff one dollar in compensatory damages but two million dollars in punitive damages).

204. *See* Mercer II, 50 F. App'x 643, 645 (4th Cir. 2002) (following Barnes v. Gorman, 536 U.S. 181, 189-90 (2002)) (holding Supreme Court's refusal to grant punitive damages in private action under Title VI requires same result in Title IX suits). Nevertheless, it should be noted that *Mercer II* was an unpublished opinion; thus, it technically has no precedential effect in the Fourth Circuit. *See id.* Consequently, it remains to be seen whether other circuits, including the Fourth Circuit, will follow the *Mercer II* Court's interpretation of *Barnes* as precluding punitive damages in Title IX private suits.

205. *See* Mercer III, 401 F.3d 199, 202 (4th Cir. 2005) (noting lack of punitive damages award significantly diminishes plaintiff's level of success).

206. *See* Mercer—Dist. Ct. III, 301 F. Supp. 2d 454, 465 (M.D.N.C. 2004) (recognizing denial of attorney's fees to Title IX plaintiffs frustrates overarching goal of Title IX).

207. *See* Hensley v. Eckerhart, 461 U.S. 424, 429 (1983) (declaring most prevailing party litigants under § 1988 should recover attorney's fees); Jones v. Lockhart, 29 F.3d 422, 424 (8th Cir. 1994) (asserting value of civil rights litigation to overall public).

208. *See Hensley*, 461 U.S. at 429 ("The purpose of § 1988 [litigation] is to ensure 'effective access to the judicial process' for persons with civil rights grievances." (quoting H.R. REP. No. 94-1558, at 1 (1976))).

209. Farrar v. Hobby, 506 U.S. 103, 114 (1992) (O'Connor, J., concurring) (alteration in original) (quoting Hewitt v. Helms, 482 U.S. 755, 762 (1987)); *see also* Rombeau, *supra* note 8, at 1202-06 (discussing impact of *Mercer II's* vacating punitive damage award).

ing that the case was legally and politically significant, the final outcome did not even leave Mercer at ground-zero.[210] Because the court held Mercer responsible for a portion of the fees and costs of the suit, Mercer is now arguably in a worse position than she was before bringing suit. Thus, while Mercer succeeded in recovering attorney's fees, the bar to punitive damages, combined with the strict test and often unpredictable outcome for recovering attorney's fees, could serve as disincentives to future Title IX plaintiffs.[211] Therefore, while a plaintiff like Mercer may have won the underlying suit, the cost of victory for future civil rights plaintiffs may simply be too great.

Sabrina Bosse

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210. *See Mercer III*, 401 F.3d at 202, 212 (affirming district court's attorney's fee award of $349,243.96 to Mercer, reduced from more than $430,000 sought).

211. *See Mercer-Dist. Ct. III*, 301 F. Supp. 2d at 465 ("[D]enying Mercer adequate fees would undermine such efforts to enforce Title IX because individuals are unlikely to seek to vindicate their rights if they have to secure monetary damages in addition to a judgment of liability in order to be compensated for attorneys' fees."); *see also* Rombeau, *supra* note 8, at 1205-06 (discussing underlying public policy reasons for allowing punitive damage awards in Title IX suits).